

ENTERED

October 30, 2015

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**EUGENE ALVIN BROXTON,
Petitioner,

v.

WILLIAM STEPHENS,
Director, Texas
Department of Criminal Justice,
Correctional Institutions Division,
Respondent.§
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H-11-CV-315

ORDER

Petitioner Eugene Alvin Broxton is a death row inmate, currently in the custody of the Texas Department of Criminal Justice. He has filed a second amended petition for a writ of habeas corpus, and Respondent seeks summary judgment. Broxton has an upcoming deadline to file a motion for leave to file a third amended petition. On October 27, 2015, Broxton filed a motion to stay this habeas corpus proceeding to allow him to pursue DNA testing in state court.

Because granting a stay effectively excuses a petitioner's failure to present his claims first to state courts, stay and abeyance is only appropriate when the district court determines there is good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless.

Rhines v. Weber, 544 U.S. 269, 277 (2005).

The biological evidence that Broxton wishes to have tested was only recently discovered. The delay in discovery resulted from law enforcement informing Broxton that the material in question had been destroyed. It therefore serves the interests of justice to stay this case and allow Broxton to return to state court. Respondent is unopposed to Broxton's request. Accordingly,

IT IS ORDERED that Broxton's unopposed motion to stay *habeas* proceedings (Doc. # 53) is **GRANTED**;

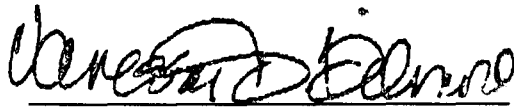
It is FURTHER ORDERED that this case is **STAYED**;

It is FURTHER ORDERED that Broxton may file an application for DNA testing in state court within 30 days of the date of this order; and

It is FURTHER ORDERED that Broxton shall move this Court for a scheduling order within 30 days of the completion of his state court proceedings, including any appeals.

SO ORDERED

Signed at Houston, Texas this 30th day of October, 2015.

A handwritten signature in black ink, appearing to read 'Vanessa D. Gilmore', written over a horizontal line.

VANESSA D. GILMORE
UNITED STATES DISTRICT JUDGE